No. 06-

IN THE

# Supreme Court of the United States

EUGENE PALLISCO,

*Petitioner,*

*v.*

HURON TOWNSHIP,
HURON TOWNSHIP LOCAL DEVELOPMENT
FINANCE AUTHORITY, and
LESLIE MEYERS, an individual,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

ROBERT D. SHEEHAN
*Counsel of Record*
SHAWN R. CIOFFI
SHEEHAN & ASSOCIATES, PLC
1460 Walton Blvd.
Suite 102
Rochester Hills, MI 48309
(248) 650-5366

*Attorneys for Petitioner*

209095

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTION PRESENTED

The Sixth Circuit affirmed the district court's dismissal of the Petitioner Eugene Pallisco's complaint for failure to state a claim under 42 U.S.C. § 1983. Pallisco alleged a conspiracy involving the Respondents to deprive him of his property interest in certain commercial real property. The complaint was dismissed prior to Pallisco being allowed to conduct discovery pursuant to Fed. R. Civ. P. 12(b)(6).

Is a plaintiff stating a conspiracy claim pursuant to § 1983 required to plead to a higher standard than what is required by Fed. R. Civ. P. 8?

## LIST OF PARTIES

The parties listed in the caption include the Petitioner Eugene Pallisco (hereinafter "Pallisco") and the Respondents Huron Township, Huron Township Local Development Finance Authority (hereinafter the "LDFA"), and Leslie Meyers (hereinafter "Meyers").

Pallisco previously stipulated to the dismissal of the Defendant David Neilsen (hereinafter "Neilsen") in the proceedings before the Sixth Circuit pursuant to a settlement.

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## OPINION BELOW

The opinion, in this matter, of the United States Court of Appeals for the Sixth Circuit is not reported. (App. A) The Sixth Circuit affirmed the March 31, 2006 decision of the United States District Court for the Eastern District of Michigan. (App. B)

## STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Sixth Circuit's opinion was rendered on March 20, 2007.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Title 42 United States Code, Section 1983.**

**Civil action for deprivation of rights.**

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial

> capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

This case is a civil rights action arising under 42 U.S.C. § 1983 premised upon Pallisco's allegations that the Respondents improperly conspired to deny Pallisco due process regarding the development of commercial real property. Pallisco purchased real property (the "Property") under a land contract from Nielsen with the express purpose of developing the Property for commercial use. Litigation later developed in the Michigan state courts over Nielsen's claims for foreclosure and forfeiture under the land contract. Huron Township and Meyers denied Pallisco's ability to file applications for the necessary permits to develop the Property. Huron Township and the LDFA then conspired to institute criminal proceedings against Pallisco and use the same a pretext for interjecting themselves into the dispute between Pallisco and the Nielsen. The LDFA entered into a purchase agreement for the Property with Pallisco in bad faith and with ulterior motives. Huron Township, the LDFA and Nielsen then conspired to push Pallisco out of the deal for the Property and deny Pallisco his Constitutionally protected rights. Huron Township and the LDFA initially entered into the purchase agreement with Pallisco because he had possession of the Property.

The trial court dismissed Pallisco's Amended Complaint for failure to state a cause of action even when accepting all the allegations as true. However, not only did Pallisco did properly allege the conspiracy, but Pallisco also alleged possible theories of motive and intent. The LDFA and Huron Township were concerned with the Property because of its status as a potentially regulated wetland. Under controlling Michigan Statutory authority the LDFA and Huron Township could obtain permits to destroy and develop existing wetland by identifying or creating new wetland. The Property, as previously unidentified wetland, provided the LDFA and the Township with an opportunity to develop existing wetland by identifying new wetland. In the alternative, the LDFA and Huron Township needed to acquire the land in order to conceal an extensive flooding problem that included municipal drains improperly discharging water onto private land.

Pallisco further alleged that the Nielsen needed to sell the property to limit his liability as a potential owner of wetlands. Nielsen was facing potential liability for remediation of the Property unless he found a buyer that would acquire the Property even with the disclosure of the wetland condition. Essentially, both were potentially stuck with unusable land.

The trial court stated in its ruling that "Pallisco only inferentially alleges that one or more people at Huron and/or the LDFA, Nielsen, and Meyers at some point struck a deal whereby the LDFA would cancel the Purchase Agreement, and then buy the Property from Nielsen after adjudication of the foreclosure action, which turned out to be two years later." Memorandum and Order, pg. 13. See Appendice B. However, the trial court suggests that even if the conspiracy is true it

did not violate Pallisco's constitutional rights because Pallisco "only lost the Property after being unable to find another buyer and losing in the Circuit Court, two things unattributable to any of the defendants." Memorandum and Order, pg. 13. See Appendice B. However, in reaching such a conclusion, the trial court failed to realize that Pallisco did have a buyer, the LDFA. The primary reason that Purchase Agreement was lost was because the LDFA entered into it in bad faith and while engaged in a conspiracy.

Finally, the trial court misconstrued Count III of Pallisco's complaint stating that "[a]greeing to dismiss a citation does not violate a constitutional right." Memorandum and Order, pg. 16. See Appendice B. However, that is not what Count III alleges. Rather, Count III of the Amended complaint alleges that LDFA and Huron Township improperly instituted and then used the criminal charges against Pallisco to better its position in negotiating the Purchase Agreement.

The procedural history of the case is relatively straight forward. Pallisco filed his Complaint on December 28, 2004. The Respondents filed Answers followed by a Motion to Dismiss. On December 14, 2005 the trial court heard oral argument on the Motions to Dismiss and entered its Order directing Pallisco to file an Amended Complaint. Pallisco filed an Amended Complaint January 13, 2006. The parties submitted Supplemental Briefs regarding the Motions to Dismiss. On March 31, 2006, the trial court entered its Memorandum and Order Granting the Appellees' Motion to Dismiss. The Sixth Circuit affirmed the district court's Memorandum and Order by its Order dated March 20, 2007.

## REASONS FOR GRANTING THE PETITION

Pallisco plead his complaint with undeniable specificity outlining a conspiracy by the respondents to deny him of his interest in the Property. Pallisco supplied even more specificity when the district court allowed him an opportunity to file his Amended Complaint. However, even with the factual specificity supplied by Pallisco regarding the alleged conspiracy the district court dismissed the Complaint effectively employing a *de facto* "heightened pleading" standard. This Court has specifically rejected heightened pleading standards, in favor of the notice pleading requirements of Fed. R. Civ. P. 8, in § 1983 cases when it rejected the Fifth Circuits holding that suits against municipalities must be stated with specificity. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). This Court has similarly rejected heightened pleading standards in Title VII and age discrimination cases, citing *Leatherman. Swierkiewicz v. Sorema,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

What has developed since is an apparent confusion between a "heightened pleading" standard and a "specificity pleading" standard. This Court recently revisited its holding in *Swierkiewicz* case and distinguished it from other cases requiring a specificity pleading standard in *Bell Atlantic Corporation v. Twombly*, 127 S.Ct. 1955 (2007), a class action antitrust case where the Court required pleading with specificity. The Court stated:

> "Plaintiffs say that our analysis runs counter to *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), which held

that 'a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 [, 93 S.Ct. 1817, 36 L.Ed.2d 668] (1973).' They argue that just as the prima facie case is a 'flexible evidentiary standard' that 'should not be transposed into a rigid pleading standard for discrimination cases,' *Swierkiewicz, supra,* at 512, 122 S.Ct. 992, 'transpos[ing] 'plus factor' summary judgment analysis woodenly into a rigid *Rule 12(b)(6)* pleading standard . . . would be unwise,' Brief for Respondents 39. As the District Court correctly understood, however, '*Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements.' *313 F.Supp.2d, at 181* (citation and footnote omitted). Even though Swierkiewicz's pleadings 'detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination,' the Court of Appeals dismissed his complaint for failing to allege certain additional facts that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination. *Swierkiewicz,* 534 U.S., at 514, 122 S.Ct. 992. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading

> requirement by insisting that Swierkiewicz allege "specific facts" beyond those necessary to state his claim and the grounds showing entitlement to relief. *Id.*, at 508, 122 S.Ct. 992.
>
> Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Bell Atlantic Corp. v. Twombley*, 127 S.Ct. at 1973.

In *Goad v. Mitchell*, 297 F.3d 497, 53 Fed.R.Serv.3d 932, 2002 Fed. App. 0250 (2002), the Sixth Circuit reversed the district court's dismissal of the plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim citing this Court's bar of a heightened pleading standard that was similarly annunciated in *Crawford-El v. Britton,* 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) where the Court stated that plaintiffs could be required to allege specific facts of wrongful motive where qualified immunity was raised as a defense to § 1983 actions. But the *Goad* court was careful to recognize that the specificity requirement was limited to the qualified immunity issue, stating

> "We emphasize, however, that the Supreme Court in *Crawford-El* was motivated by the particular problem raised by the conjunction of constitutional claims that require proof of improper motive and the doctrine of qualified immunity, which is "an entitlement not to stand trial or face the other burdens of litigation."

> *See Saucier,* 121 S.Ct. at 2156 (quoting *Mitchell v. Forsyth,* 472 U.S. 511-526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). We therefore do not believe that district courts should require plaintiffs to produce specific, nonconclusory factual allegations of improper motive in cases in which improper motive is not at issue or in which qualified immunity cannot be raised as an affirmative defense. In other cases, "summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial." *Crawford-El,* 523 U.S. at 600, 118 S.Ct. 1584." *Goad v. Mitchell,* 297 F.3d at 505.

In the present case the District Court and the Sixth Circuit deviated from the established principals barring heightened pleading standards to such a degree that this court should exercise its supervisory power.

This is a case about access to the litigation process. Review is necessary to clarify the standard to which a plaintiff must allege and plead a conspiracy under § 1983. Conspiracies by definition are difficult to prove without the benefit of discovery. The conspirators will conceal from the victim the true nature of their actions. It is a truism that a successful conspiracy may be suspected, but never fully exposed. It is only the unsuccessful conspiracy that is completely revealed. If too high of a threshold is required for pleading civil rights conspiracy cases, then there will only redress for the unsuccessful conspiracies. Successful conspiracies will remain shrouded and immune from the discovery process.

In the present case, Pallisco pled with overwhelming specificity all of the facts known to him. The district court established such a high threshold so as to essentially bar Pallisco from the litigation and discovery process because he was unable to prove the full conspiracy without the discovery. As this Court stated in *Crawford-El*, "summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial." *Crawford-El*, 523 U.S. at 600, 118 S.Ct. 1584. If Pallisco's complaint was dismissed pursuant to summary judgment, then review would not be necessary. If the conspiracy still remained concealed or unproven after reasonable discovery, then the matter would have been ripe for summary judgment. But as it stands, Pallisco's case was dismissed for failing to fully identify the conspiracy that was being hidden from him.

## REVIEW IS WARRANTED TO CLARIFY THE PLEADING STANDARD TO WHICH A § 1983 CONSPIRACY PLAINTIFF WILL BE HELD AND AVOID CONFUSION BETWEEN A "HEIGHTENED PLEADING" STANDARD AND A "SPECIFICITY" STANDARD.

### 1. *The Sixth Circuit's affirmation of the trial court conflicts with the pleading requirements stated by this Court in Leatherman v. Tarrant County.*

By affirming the trial court, the Sixth Circuit has effectively subjected the Petitioner to an impermissible heightened pleading standard. This Court has specifically rejected heightened pleading standards, in favor of the notice pleading requirements of Fed. R. Civ. P. 8, in § 1983 cases when it rejected the Fifth Circuit's holding that suits against municipalities must be stated with specificity. *Leatherman*

*v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Pallisco alleged with factual specificity the conspiracy to deprive him of the Property.

The Fifth Amendment of the United States Constitution states that a person shall not be deprived of property without due process of law, nor shall property be taken for public use without just compensation. A civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, where those persons agree to inflict an injury upon another and where there is an overt act resulting in damages. In a § 1983 case, plaintiff must allege and prove both a conspiracy and an actual deprivation of rights. *Hampton v. Hanrahan,* 600 F.2d 600, 620-23 (7th Cir. 1979), *cert. denied,* 446 U.S. 754 (1980) (per curiam)

It is necessary for a § 1983 conspiracy claim that a constitutional deprivation be alleged and proved. A conspiracy standing alone is insufficient. *Dixon v. City of Lawton, Okl.*, 898 F.2d 1443, 1449 (10th Cir. 1990). But, the conspirators need not know that their conduct is unconstitutional; specific intent to cause a constitutional deprivation is not required. There must be an understanding or some concerted effort or plan, to cause harm or injury to the plaintiff. A "smoking gun" is not necessary. The Eleventh Circuit rejected a "smoking gun" requirement and put the general rule this way: "[N]othing more than an 'understanding' and 'willful participation' is necessary to show the kind of joint action that will subject private parties to Section 1983 liability." *Bendiburg v. Dempsey,* 909 F.2d 463, 469 (11th Cir. 1990).

Pallisco alleged in his Amended Complaint that he had reached a number of agreements with both the Nielsen and the Huron Township and LDFA regarding the subject Property. Pallisco had agreed with Nielsen to hold off litigation in anticipation of a sale of the Property by Pallisco to LDFA. Conversely, the LDFA had agreed to purchase the Property, and Huron Township had agreed to the dismissal of criminal charges against Pallisco. A scenario had been established where Pallisco could sell the Property to the LDFA, use the proceeds to pay off the land contract with the Nielsen, and also resolve the pending criminal charge brought by Huron Township. However, the Respondents, each and every, conspired to shut Pallisco out and transact the exchange of the Property without him and directly between Nielsen and the LDFA.

The Respondents erroneously asserted that Pallisco did not allege an ownership in interest in the Property. The LDFA and Huron Township alleged that they were insulated because of a ruling from the Wayne County Circuit Court awarding the Property to Nielsen. To the contrary, Pallisco alleged that he was a land contract vendee. A vendee's equitable title is a real estate interest. As such, it may be mortgaged or conveyed, subject only to valid restrictions in the parties' agreement. *Bowen v. Lansing*, 129 Mich. 117, 88 NW 384 (1901). Contrary to the Respondent's assertions, Pallisco's property rights were not watered down or non-existent. Furthermore, Pallisco alleged first contact with Huron Township well prior to the state law action filed by the land contract vendor, Nielsen. Pallisco's first contact with the LDFA was only shortly after the Nielsen filed suit in the Wayne County Circuit Court. Pallisco's property interests were well founded at all relevant times and were not subject to any adverse ruling by the state law trial court. In other words, the Respondents

could not rely on the adjudication of the state court action against the Pallisco, because it is alleged that the conspiracy began before that adjudication.

Finally, the Respondent's assertion, and the trial court's holding, that Pallisco did not have any protected property right is undercut by Pallisco's allegations that the LDFA solicited Pallisco well before the LDFA solicited Nielsen. In other words, Pallisco's property rights are corroborated by the fact the LDFA attempted to buy the Property from Pallisco, and not Nielsen. For a substantial portion of the times alleged in the Amended Complaint, Pallisco was in actual possession of and entitled to the substantial property rights he enjoyed as a land contract vendee.

Pallisco also provided allegations of prosecutorial misconduct. The Respondents relied upon *McKinley v. City of Mansfield*, 404 F.3d 418 (CA6, 2005) for the proposition that the Appellants cannot be held liable for malicious prosecution since, as claimed only by the Respondents, the Respondents did not participate in the decision to prosecute. To the contrary, Pallisco alleged that Huron Township instituted the criminal complaint against Pallisco. *McKinley* can distinguished from the case at bar. The *McKinley* trial court granted summary judgment; the present case was dismissed for failure to state a claim. The *McKinley* court specifically stated that the plaintiff did not come forward with evidence that the defendant did conspire or participate in the decision to prosecute. *McKinley*, 404 F.3d at 444. In the present case, Pallisco did have the opportunity to develop such evidence through discovery.

The trial court mischaracterized Pallisco's third count as malicious prosecution. Memorandum and Order, pg. 13.

See Appendice B. To the contrary, the third count of the Amended Complaint contains allegations of more than just malicious prosecution. Pallisco does not simply point to the decision to prosecute as a violation of Constitutional Rights, but it was the manner in which the prosecution was used as leverage against Pallisco. Pallisco specifically alleges the use of Huron Township's prosecutorial power for improper leverage against Pallisco. The Amended Complaint does not simply allege a misuse of prosecutorial power in the decision to prosecute, but rather what was also done with the prosecutorial power after the initial charge in order to better the LDFA's position in a real estate contract with a private person and deprive Pallisco of his constitutional right.

### 2. *The Sixth Circuit's affirmation of the trial court conflicts with the analogous pleading standards stated by this Court in Crawford-El v. Britton.*

This Court has previously held that plaintiffs may be required to come forward with specific factual allegations of improper motive when qualified immunity is raised as a defense in a § 1983 case. *Crawford-El v. Britton,* 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998). Pallisco was not required to plead to the standard stated in the *Crawford-El*, since no claim of qualified immunity was made. Nevertheless, in an effort to satisfy the trial court, Pallisco pled to the higher standard alleging two possible motives for the conspiracy. First, that the Respondents were attempting to avoid having to use the proper state law condemnation act, and, second, that the Respondents were attempting to conceal the Properties' status as a regulated wetland.

The Respondents went on to attack Pallisco's proposed motivations for the alleged conspiracy: 1) that the Respondents wished to avoid the condemnation of the Property, and/or 2) that the Appellants had various concerns regarding the Property's wetland characteristics. Pallisco presented the proposed motivation as alternative theories. While Michigan is a notice pleading state, generally more specific allegations must be pled for a conspiracy claim. See *Farah v. Martin*, 122 F.R.D. 24 (E.D. Mich. 1988). However, the United States Supreme Court has also held that broader allegations such as a plaintiff alleging a "'spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective" were sufficient to create a "class of one" in an equal protection claim. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073 (2000). In the present case, Pallisco endeavored to strike a balance in his allegations by pleading with specificity proposed motivations of the various conspirators. While equal protection claims require motivation related to membership in a protected class, Pallisco's due process claim does not require such proof of motivation. There is no requirement that the motivations alleged bare out to the motivations in fact.

While the Michigan Uniform Condemnation Procedures Act allows for only a single good faith written offer be made for a single parcel, there is no prohibition that the adjudicated just compensation will not be divided among multiple parties. The reality is that condemnation of the Property would have subjected Huron Township and LDFA to significant costs that could be avoided by an outright buy. The Respondents were dismissive of Pallisco's suggestion that the condemnation procedure would subject the purchase to a high level of scrutiny. The Respondents cited to the Open Meetings and Freedom of Information Acts as subjecting a straight

buy to higher scrutiny since judicial proceedings are exempt. This is misplaced for two reasons. First, the Michigan Uniform Condemnations Procedures Act contains an attorney fee and expert appraiser provision that compensates a party for those expenses. See MCLA 213.66. This means that in any given condemnation there is an exceedingly high probability that it will be subject to the adversarial adjudicative process. The second reason the Respondent's logic is misplaced is because the Respondent's failed to respond to a Freedom of Information Act request regarding this very matter. Pallisco's Complaint contained a cause of action for violation of the Freedom of Information Act, while the cause of action was removed in the First Amended Complaint, the allegation remained.

The Respondents attacked Pallisco's theory of motivation regarding the Property's wetland status. The Respondents proposed a number of rhetorical questions that fail to recognize Pallisco has pled in the alternative. Pallisco's allegations are relatively straight forward. The Respondents were either attempting to acquire the Property to identify the Property as wetlands, or in the alternative, the Respondents were looking to conceal its status as a wetland. Such identification would have allowed the Appellants to destroy wetlands in another area. The fact that the Respondents' activity and the Property's status as a wetland could be subsequently discovered does not mean that it still was not a motivation. Furthermore, such arguments go to evidentiary proofs, or what Pallisco may be able to prove was the Respondents' motivations, and are not the purview of a Motion to Dismiss. Not only did Pallisco properly allege the conspiracy, but Pallisco also alleged possible theories of motive and intent.

## CONCLUSION

For the reasons stated herein, the Petitioner Eugene Pallisco respectfully requests this Honorable Court grant review of this matter.

Respectfully submitted,

ROBERT D. SHEEHAN
*Counsel of Record*
SHAWN R. CIOFFI
SHEEHAN & ASSOCIATES, PLC
1460 Walton Blvd.
Suite 102
Rochester Hills, MI 48309
(248) 650-5366

*Attorneys for Petitioner*

# APPENDIX

# APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED MARCH 20, 2007

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-1638

EUGENE PALLISCO,

Plaintiff-Appellant,

v.

HURON TOWNSHIP; HURON TOWNSHIP LOCAL DEVELOPMENT FINANCE AUTHORITY; LESLIE MEYERS; DAVID NIELSEN,

Defendants-Appellees.

Before COLE, SUTTON, and COOK, Circuit Judges.

PER CURIAM. Eugene Pallisco appeals the district court's dismissal of his suit against the defendants[1] for failure to state a claim upon which relief can be granted. Having reviewed the record and the applicable law, and having the benefit of oral argument and the parties' briefs, we determine that no jurisprudential purpose would be served by a panel opinion and affirm the district court's decision for the reasons stated in that court's opinion.

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1. On June 26, 2006, in light of David Nielsen's settlement with Pallisco, this court ordered Nielsen dismissed from this appeal.

**APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION GRANTING DEFENDANTS' MOTION TO DISMISS DATED AND FILED MARCH 31, 2006**

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

No. 04-75059

EUGENE PALLISCO,

Plaintiff,

v.

HURON TOWNSHIP, HURON TOWNSHIP LOCAL DEVELOPMENT FINANCE AUTHORITY, LESLIE MEYERS, and DAVID NIELSEN,

Defendants.

**MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS.**

**I. Introduction.**

This is a civil rights case arising from a land contract sale of property in Huron Township, Wayne County, Michigan. Plaintiff Eugene Pallisco (Pallisco) claims that Defendants David Nielsen (Nielsen), Huron Township (Huron), Huron Township Zoning Administrator Leslie Meyers (Meyers), and the Huron Township Local Development Finance Authority (LDFA) conspired to deprive him of his property in violation of the Constitution.

*Appendix B*

Palllisco sets forth the following claims in the First Amended Complaint:

Count 1: conspiracy to effectuate a taking of property without compensation in violation of the Fifth Amendment against all defendants;

Count 2: conspiracy to deprive plaintiff of property without due process in violation of the Fourteenth Amendment against all defendants;

Count 3: malicious prosecution in violation of the Fourteenth Amendment against Huron and the LDFA.[1]

Before the Court are separate motions to dismiss for failure to state a claim upon which relief can be granted by (1) Huron, the LDFA and Meyers, and (2) Nielsen. For the reasons state below, the motions are GRANTED.[2]

**II. Background.**[3]

On November 13, 1999, Pallisco entered into a purchase agreement with Nielsen for unimproved real property (Property) in Huron Township. During a due diligence period,

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1. In his papers, Pallisco describes Count 3 as more than just a malicious prosecution claim. This contention will be addressed.

2. At a hearing on the motions to dismiss in December, 2005, the Court ordered plaintiff to file an amended complaint. Plaintiff did so, defendants filed supplemental papers, and plaintiff responded.

3. The background is gleaned from the First Amended Complaint (complaint).

*Appendix B*

Nielsen provided Pallisco with environmental reports regarding the Property prepared by Applied Science & Technology, Incorporated (ASTI). Nielsen also provided Pallisco with a copy of a Phase I Environmental Site Assessment (Nielsen Phase I). The reports cited no significant environmental concerns.

On or about March 20, 2000, Pallisco and Nielsen closed on the Property by execution of a land contract. Pallisco began construction on the Property, which he intended to use for temporary storage of containerized cargo. During construction of a road and parking lot, a contractor discovered a significant flooding problem, though construction continued. On April 7, 2000, however, a Huron building inspector, Vince Pacheco, issued a stop work order because a site plan allegedly had not been filed with Huron.

In May, 2000, Pallisco listed the Property for sale because of the construction delay and because the Property no longer fit his purpose. In July, 2000, Huron issued a Misdemeanor Uniform Law Citation (Citation) against Pallisco alleging that he had failed to secure the proper construction permits for improvement of the Property, and that the construction had caused flooding on the Property. It is unclear who signed the Citation. Pallisco did not receive notice of the Citation until December, 2000.

Following issuance of the citation, Pallisco discovered that the Property may be a wetland under Michigan law. The proceedings on the Citation were repeatedly adjourned by consent of the parties while Pallisco examined his options for the Property and its potential classification as a protected

wetland. Pallisco's options included submission and approval of a corrected site plan, or remediation.

In March, 2001, Pallisco attempted to file a site plan for the Property with Huron. Pallisco met with Meyers, who refused to accept the site plan for filing. Meyers informed Pallisco that she would not review any site plan submitted by Pallisco for the Property. While discussing the Citation in early summer 2001, Huron asserted that Pallisco's road construction caused the flooding on the Property and adjoining land. Pallisco says some evidence existed that the Property had always been a wetland despite representations made by Nielsen and the environmental reports. Pallisco stopped payments to Nielsen on the land contract pending resolution of the Property problems.

On July 3, 2001, Nielsen foreclosured on the Property by filing an action in Wayne County Circuit Court. Pallisco brought counter-claims against Nielsen. In August, 2001, the LDFA contacted Pallisco to find out his asking price for the Property; negotiations ensued. During the negotiations, the LDFA indicated that Huron would dismiss the Citation against Pallisco as part of the sale.

Pallisco and the LDFA exchanged drafts of a sales contract (Purchase Agreement) in August, 2001. On August 22, 2001, the LDFA confirmed that Huron would dismiss the Citation. Pallisco and the LDFA entered into a Purchase Agreement on November 16, 2001. The closing date was set for December 4, 2001. The closing was contingent on completion of a Phase I Environmental Study (Huron Phase I). Because the Huron Phase I was not completed in time,

the closing date was pushed back. Pallisco made numerous demands to expedite the closing, which the LDFA continued to stall. Nielsen and Pallisco delayed pursuing their litigation in anticipation of the sale to the LDFA.

On December 27, 2001, the LDFA provided Pallisco with a copy of the completed Huron Phase 1. The LDFA cited three potential problems with the Property: potential storage tanks, slag material, and potental wetland conditions. Initially the LDFA sought to conduct a Phase II or wetlands survey on the Property. On January 4, 2002, the LDFA informed Pallisco that it would not be purchasing the Property based on the Phase I Study.

To keep the deal alive, the LDFA sought permission to enter the Property to perform a preliminary wetland inspection (LDFA Wetland Inspection). Pallisco granted the permission on January 11, 2002, on the condition that the LDFA provide Pallisco with a copy of the LDFA Wetland Inspection. The LDFA Wetland Inspection concluded that the Property contained wetlands under Michigan Department of Environmental Quality jurisdiction. The LDFA decided, once again, not to purchase the property. On March 14, 2002, the LDFA provided Pallisco with the LDFA Wetland Inspection

Following the LDFA's decision not to purchase the Property, the litigation between Nielsen and Pallisco resumed. The Circuit Court granted summary disposition to Nielsen in February, 2002; the Michigan Court of Appeals reversed that judgment and remanded the case for trial. While preparing for trial, Pallisco hired a wetlands expert. The expert discovered a thirty-six inch diameter underground pipe

discharging a significant amount of water onto the Property. The expert determined that the pipe terminated on adjoining land, was not readily apparent, explained the flooding on the Property, and supported the idea that wetland conditions on the Property were artificially created.

In February, 2003, the Circuit Court entered a final judgment in the Nielsen and Pallisco case after both parties agreed to accept the results of a court mandated case evaluation. Under the evaluation, the Circuit Court ordered Pallisco to pay Nielsen $25,000 and Nielsen took title to the Property. Pallisco appealed the final judgment, arguing that the court improperly returned possession of the Property to Nielsen. The Michigan Court of Appeals denied leave to appeal in February, 2004.

On or about March 3, 2004, only weeks after the Michigan Court of Appeals' decision, Nielsen conveyed title to the Property to the LDFA by warranty deed. The LDFA agreed to buy the Property for $175,000, $25,000 less than the LDFA had agreed to pay Pallisco. Construction on the Property began on the Property, presumably by the LDFA. Pallisco filed the suit against the defendants on December 28, 2004.

## III. Discussion

### A. Legal Standard

A Fed. R. Civ. P. 12(b)(6) motion seeks dismissal for a plaintiff's failure to state a claim upon which relief can be granted. "The court must construe the complaint in the light

most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief." *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360 (6th Cir.2001). "To survive a motion to dismiss under Rule 12(b)(6), a 'complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.'" *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n.*, 176 F.3d 315, 319 (6th Cir.1999) (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir.1988)).

**B. Analysis.**

**1. Introduction.**

A cause of action under 42 U.S.C.1983 requires the plaintiff to show: (1) that he was deprived of a right secured by the Constitution or laws of the United States; and (2) the deprivation was caused by someone acting under color of state law. *Perry v. McGinnis*, 209 F.3d 597, 603 (6th Cir.2000). Pallisco asserts a deprivation of his property rights through a government taking and without due process, and malicious prosecution.

*Appendix B*

## 2. Counts 1 & 2-Deprivation of Property Without Due Process.

### a. Pallisco's Claims.

#### i. Background.

The claims and relevant facts in Counts 1 and 2 are similar, thus they will be considered jointly. Both are asserted against all defendants. There are only slight differences. Count 2 alleges that the defendants violated due process in depriving Pallisco of his property, whereas Count 1 alleges that the defendants took his property under the Takings Clause without adequate compensation in violation of due process. Each count seeks damages for the same loss.

#### ii. Count 1.

The complaint asserts that the defendants entered into an agreement to push Pallisco out of the Purchase Agreement with the LDFA and otherwise interfere with his property rights. The complaint says Michigan law permits Huron and the LDFA to condemn, purchase, lease, or otherwise dispose of property, but that doing so here potentially would have required payment to Nielsen and Pallisco, or could have exposed a municipal drain flooding the Property, a problem Huron wanted to avoid. The complaint says Huron wanted the Property as a wetland because creating a new wetland would permit it to develop existing wetlands. The complaint says Meyers ensured the continued frustration of Pallisco's purposes by refusing to review a site plan to depress the value of the Property. Additionally, the complaint says Neilsen

agreed to facilitate the avoidance of the condemnation procedures by agreeing to sell the Property for a depressed price. The complaint also says Huron and the LDFA had a de facto policy of deliberate indifference to individuals such as Pallisco.

### iii. Count 2.

The complaint asserts that Pallisco was denied due process by the defendants because they deprived him of the ownership in, right to build on, and his right to relocation assistance from the Property,[4] in violation of the Fourteenth Amendment. The complaint says the LDFA entered into the Purchase Agreement in bad faith and with an ulterior purpose, and that Huron and the LDFA used the pending criminal charges arising from the Citation as a bargaining tool during negotiations. The complaint says the LDFA used environmental reports as a pretext for cancelling the Purchase Agreement, as the LDFA purchased the property from Nielsen later. The complaint says Nielsen and Meyers' actions facilitated the due process violation. The complaint says Huron and the LDFA had a de facto policy of deliberate indifference to individuals such as Pallisco, thus causing a violation of his constitutional rights.

### b. Huron, the LDFA, and Meyers' Argument.

Huron, the LDFA, and Meyers (collectively "Huron Defendants") say Pallisco cannot sustain a claim for a taking

4. A person who has property taken by the government by eminent domain may be entitled to relocation assistance. M.C.L. § 125.2151, et seq.

in violation of the Fifth Amendment because he had no protected property interest in the Property. The Huron Defendants say Pallisco has not alleged governmental interference in his ownership of property because Pallisco lost the Property when he failed to pay Nielsen, and this dispute was fully and finally resolved in state court. Instead, the Huron Defendants say Pallisco only claims property interests such as "alienability," "the right to build," and the right to the issuance of a site plan, and these are not protected property rights under the Takings Clause. Alternatively, the Huron Defendants say if a property right did exist, Pallisco lost it when he lost ownership of the Property, not due to any action on their part or anyone acting under color of state law.

The Huron Defendants also say the complaint's allegation that Huron was reticent to condemn the land ignores the fact that a court, not Huron, would decide how much to pay each party with an ownership interest, that Huron would not have to double-pay if there were two parties with ownership interest, and that a condemnation action requires the same, if not more, public disclosure and scrutiny than a purchase of land, as both are subject to the Michigan Open Meetings Act.

The Huron Defendants say the entire alleged conspiracy is dependant upon Pallisco's failure to make payments on the land contract and Pallisco's decision to list the property for sale on the open market. They say the alleged interest in keeping the wetland condition of the land secret is contradicted by the fact that the LDFA conducted numerous environmental studies on the land and gave a copy of the studies to Pallisco.

Finally, the Huron Defendants say Pallisco's claims about Meyers' actions in denying the site plan approval are not ripe for review because he never exercised his right to appeal the decision, thus it is not a final decision. Since Pallisco no longer owns the property, pursuing such a decision is futile.

**c. Nielsen's argument.**

Nielsen argues that he is a private actor and not subject to a § 1983 claim, and that the complaint does not plead that he was a private actor acting under the color of state law. A private person is considered a state actor if that person exercises some right or privilege created by the state, acted together with or obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Nielsen says Pallisco has made no allegations as to the existence of a sufficiently close relationship between Nielsen and Huron to support the conclusion that Nielsen acted with state authority. *Wittstock v. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir.2003).

Additionally, Nielsen says that the only acts attributed to him in the complaint are that he conveyed the Property to others when he held title to the Property, which only happened after waiting until the Michigan Court of Appeals confirmed his title to the Property by upholding the Circuit Court's judgment. While other paragraphs allege "improper acts," Nielsen says, there is no description of any such action. To establish a civil conspiracy, Nielsen says Pallisco must show "there was a single plan, that the alleged co-conspirator shared in the general conspiratorial objective, and that an

overt act was committed in furtherance of the conspiracy that caused injury to the claimant." *Hooks v. Hooks*, 771 F.2d 935, 944 (6th Cir.1985). Conspiracy claims must be "pled with some degree of specificity," and vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir.1987). Nielsen says Pallisco has alleged no specific facts to establish the existence of a common plan between the defendants, or that they acted in furtherance of the alleged plan.

**d. Pallisco's Response.**

As to the Huron Defendants, Pallisco says he did have a protected property interest as a land contract vendee, and this interest was interfered with. Pallisco says he could have sold the property to the LDFA in late 2001, used the proceeds to pay off the land contract, and resolved the pending Citation brought by Huron. Instead, all defendants conspired to interfere with the Purchase Agreement and his property rights, Pallisco says. Eventually the LDFA and Nielsen exchanged the property directly. Furthermore, Huron and Meyers' refusal to review any site plan denied him due process, thereby preventing any construction on the Property. Given the proximity in time between Nielsen's foreclosure action and the LDFA's first contact with Pallisco about the Property, Pallisco says the conspiracy began before the foreclosure action was filed, thus the Michigan courts' resolution of the matter is non-binding.

Pallisco says that challenges regarding the various motives of each participant in the conspiracy alleged in the

complaint is improper on a motion to dismiss, and the alleged motives only reflect alternative theories of the case. Pallisco says the argument that his failure to appeal the denial of the site plan ignores the fact that he was never even allowed to submit a site plan.

Even if any individual action was legal, Pallisco says that by entering into a conspiracy the actions became unlawful. A civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, where those persons agree to inflict an injury upon another and where there is an overt act resulting in damages. *Hampton v. Hanrahan*, 600 F.2d 600, 620 (7th Cir.1979).

As to Nielsen, Pallisco says that a private person who participates in a conspiracy with a state or local government official to violate a plaintiff's Fourteenth Amendment rights thereby acts under color of law and may be liable under § 1983. *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The question before the Court is not whether Pallisco can prove the conspiracy, but whether his complaint sufficiently alleges the conspiracy. Pallisco says it does.

Regarding Nielsen's actions, Pallisco says Nielsen conspired to interfere with his agreement with the LDFA, thereby depriving him of any interest he had in the property, and that his involvement began long before he sold the property to the LDFA.

*Appendix B*

**c. Resolution.**

As the owner of the Property throughout 2001, Pallisco did have a property interest protected by the Constitution. The complaint also adequately asserts facts bringing Nielsen's actions, combined with Huron and the LDFA alleged conduct, within the scope of state action for purposes of a motion to dismiss. The question is whether any of the defendants' actions deprived Pallisco of the Property. On this topic deficiencies in the complaint remain. The complaint fails to attribute specific conduct to specific individuals, and alleges that Huron, a township, and the LDFA, an economic development corporation, committed numerous acts that could only be committed by agents or employees. This leaves Nielsen and Meyers wondering what they are alleged to have done. There are no specific allegations that Nielsen was involved in the collapse of the Pallisco-LDFA Purchase Agreement. There is only an allegation that Nielsen knew of the pending Purchase Agreement, which caused him to agree to postpone the foreclosure action for many months, a decision beneficial to Nielsen. There is no breach of contract claim or assertion that the LDFA breached the Purchase Agreement when it decided not to purchase the Property from Pallisco in January, 2002. The fact that the LDFA decided to buy the Property more than two years later from Nielsen does not mean that anything the LDFA did deprived Pallisco of the Property, and does not mean its decision not to purchase the Property from Pallisco is a constitutional violation. Meyers' only alleged contribution to the conspiracy was her failure to accept a site plan for the Property. Meyers' action led Pallisco to put the land up for sale, but had nothing to do with who purchased the Property. Something as simple as an

alternative buyer coming forward to purchase the Property would have thwarted the entire goal of the alleged conspiracy.

The moment in time Pallisco focuses on was when the completion of the Purchase Agreement would have solved all of his problems by ridding himself of the Property, the Citation, and the foreclosure action. As described in the complaint, however, Pallisco's decision to stop paying on the land contract and put the Property up for sale, and the state court's disposition of the case with Nielsen, caused Pallisco's loss of the Property. Pallisco lost title to the Property after the Circuit Court entered a judgment against him based upon results of a case evaluation in Nielsen's foreclosure action. While Pallisco might not have lost as much money on the deal had the LDFA purchased the Property in late 2001, the LDFA was under no obligation to do so. Pallisco only inferentially alleges that one or more people at Huron and/or the LDFA, Nielsen, and Meyers[5] at some point struck a deal whereby the LDFA would cancel the Purchase Agreement, and then buy the Property from Nielsen after adjudication of the foreclosure action, which turned out to be two years later. But even if such an agreement existed, it does not violate Pallisco's constitutional rights because he only lost the Property after being unable to find another buyer and losing in the Circuit Court, two things unattributable to any of the defendants.

5. Meyers refused to accept Pallisco's site plan about three months before the LDFA approached him about the Property. There is no allegation that Meyers was at all involved with the Purchase Agreement or even knew about it. And there is no allegation that Meyers' single decision to reject the site plan had anything to do with the LDFA's decision to back out of the Purchase Agreement. It is unclear what Pallisco asserts to be Meyers' role.

*Appendix B*

**3. Count III-Malicious Prosecution.**

**a. The Claim.**

The complaint asserts that Huron issued the Citation against Pallisco without probable cause and as a pretext to harass him.[6] The complaint says Pallisco had defenses to the Citation, and that it was dismissed in his favor. The complaint says Huron's issuance of the Citation violated Pallisco's Fourth Amendment rights. The complaint says the LDFA's subsequent use of the Citation to better its bargaining position to purchase the Property deprived him of a liberty interest without due process under the Fifth and Fourteenth Amendments, and violated his Sixth Amendment right to a speedy and public trial. The complaint says Huron and the LDFA had a de facto policy of deliberate indifference to individuals like Pallisco.

**b. Huron and the LDFA's Argument.**

First, Huron and the LDFA say that Pallisco's malicious prosecution claim violates the statute of limitations. Pallisco's claim accrued on September 26, 2001, the date that the Citation was administratively disposed of following a dismissal by the 34 District Court for Wayne County. This fact can be determined by taking judicial notice of a public record. *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir.1999). A malicious prosecution claim accrues on the date the proceedings are terminated in favor of the plaintiff. *Parisi v. Michigan Townships Ass'n*, 123 Mich.App. 512, 332

6. It is unknown who signed the Citation. Malicious prosecution claims typically are against the officer issuing the citation.

N.W.2d 587 (1983). Under state law, a malicious prosecution claim has a statute of limitations of two years, M.C.L. § 600.5805(5), and a malicious prosecution claim under § 1983 has a statute of limitations of three years, *Chippewa Trading Co. v. Cox*, 365 F.3d 538, 543 (6th Cir.2004). Pallisco filed his complaint on December 28, 2004, more than three years after this claim accrued according to the allegations of the complaint.

Second, Huron and the LDFA say there is no federally protected right from malicious prosecution, thus it cannot be the basis for a § 1983 claim. Third, Huron and the LDFA say the claim can only be brought against the person who made the decision to prosecute, and Pallisco has not alleged that Huron or the LDFA made that decision. Fourth, Huron and the LDFA say a § 1983 action for malicious prosecution cannot be sustained when there was probable cause to prosecute, and Pallisco admits that he did not file a site plan which formed the basis of the Citation. Finally, Huron and the LDFA say a § 1983 claim for malicious prosecution requires evidence of an independent constitutional violation arising from the decision to prosecute, and not merely a generic deprivation of liberty or trial rights. Pallisco was never incarcerated and the prosecution was dismissed without a trial, thus no independent violation occurred.

**c. Pallisco's Argument.**

Pallisco claims the Citation lacked probable cause, thus amounting to malicious prosecution, and that Huron and the LDFA's use of the Citation to induce him to enter into the Purchase Agreement with the LDFA is a constitutional

violation, making Count 3 something more than a malicious prosecution charge. Pallisco makes two arguments as to why the statute of limitations for this claim has not been violated. First, to determine the date that the cause of action accrued would require fact-finding and an examination of documents outside of the pleadings. Huron and the LDFA, Pallisco says, support their chosen date by reference to a register of actions, whereas a motion under 12(b)(6) only tests the pleadings. A motion for summary judgment is proper to consider this argument, and the issue has not been fully briefed.

Second, Pallisco argues that there is no proof that he was served with the notice of dismissal after which the statute of limitations allegedly began to run, and that all defendants engaged in a conspiracy to obscure the malicious prosecution action from him by enticing him into the Purchase Agreement. Under the discovery rule, the statute of limitations begins when the plaintiff discovers the claim. Pallisco says disputed facts make the adjudication of the discovery rule unresolvable on a motion to dismiss.

Pallisco also argues that he must be given an opportunity, through discovery, to determine what role Huron and the LDFA played in the decision to issue the Citation, and provide evidence of how the decision was part of the conspiracy. Pallisco concludes by saying that Count 3 includes the manner in which the prosecution was used as improper leverage against the him in negotiations for the sale of the Property, thus violating his constitutional rights.

*Appendix B*

**Resolution.**

Ignoring the possible statute of limitations violation, Pallisco's complaint does not plead a violation of a constitutional right. Pallisco says he pled Count 3 as something more than a malicious prosecution charge, claiming that Huron and the LDFA's use of the Citation as a bargaining chip furthered the conspiracy to deprive him of property. It appears, however, that all Huron did was agree to dismiss the Citation as part of the Purchase Agreement. Even after the Purchase Agreement fell apart, Huron did not re-institute the dismissed Citation. A Huron employee, Pacheco, issued a stop work order, upon which the Citation was based due to Pallisco's failure to file a site plan. Pallisco's complaint does not assert that a site plan had been filed. Soon after Pacheco's order stopped him from developing the Property, Pallisco advertised the Property for sale. The LDFA contacted Pallisco because it was interested in buying the Property. Offering to dismiss the Citation as part of the negotiations does not implicate a constitutional right, and Pallisco did not have to negotiate with the LDFA. Agreeing to dismiss a citation does not violate a constitutional right.

*Appendix B*

**6. Conclusion.**

Accepting all factual allegations in the complaint as true, Pallisco does not state a claim upon which relief can be granted. Counts 1 and 2 do not allege that state action deprived him of his property interest, and Count 3 does not allege the violation of a constitutional right. The case is DISMISSED.

s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated:
Detroit, Michigan